

Respondent contends the Administrative Law Judge's determination of the nature and extent of disability should be affirmed.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant was employed by the respondent as an Equipment Operator II. On August 28, 1998, the claimant was helping get a mower unstuck. When he lifted a mower deck, he injured his back.

After a course of conservative treatment, on December 22, 1998, Dr. Kneidel performed surgery which consisted of left L4-5 and left L5-S1 discectomies and a left L3-4 exploration. Dr. Kneidel released the claimant to return to work on March 17, 1999, with permanent restrictions of a 50-pound weight limit and no operating heavy equipment.

On March 29, 1999, the respondent notified the claimant that because of the restrictions imposed by Dr. Kneidel, the claimant would be unable to perform the essential job functions of his position and he was terminated effective March 17, 1999.

The claimant relocated to Hollister, Missouri because he had family in that locale and there was work available within his restrictions. Initially, the claimant did some computer work for approximately three weeks. He then obtained work as a grill cook at a small golf course for about a week. Lastly, he obtained employment as a cook in his mother's cobbler shop in Branson, Missouri.

After the surgery, the claimant continued to experience persistent pain in his left leg and numbness in his left foot. Following an additional course of conservative treatment, the claimant was referred to H. Mark Crabtree, M. D. for evaluation and treatment. An MRI revealed a recurrent disc herniation at L4-5. On December 16, 1999, Dr. Crabtree performed surgery which consisted of a hemilaminotomy with microdiscectomy at L4-L5.

Post-operatively, the claimant underwent a regime of physical therapy in the form of work conditioning. On February 25, 2000, Dr. Crabtree rated the claimant with a 6 percent permanent partial whole body impairment and released claimant to return to work without restrictions.

Upon his release by Dr. Crabtree, the claimant returned to work as a cook at his mother's restaurant. The claimant is paid \$250 a week. He described his job as requiring occasional lifting of cases of tomatoes and lettuce that weigh approximately 40 pounds. He is required to stand for his eight hour work shift and his duties require frequent bending, twisting and turning at the waist with repetitive use of his hands and arms. The claimant testified that with increased physical activity he still experiences increased back discomfort.

The claimant was referred to Dr. Murati by his attorney for evaluation and rating. Dr. Murati initially examined the claimant on April 14, 1999, and performed a second examination on April 28, 2000.

After the first surgery, Dr. Murati imposed work restrictions of no crawling and no heavy equipment operating. He noted claimant could occasionally bend, climb stairs, climb

ladders, squat, lift/carry/push/pull 50 pounds. He noted claimant could frequently sit, stand, walk, drive, lift/carry/push/pull 35 pounds and constantly 20 pounds. Lastly, the claimant should alternate sitting, standing and walking. Based upon the AMA Guides, Fourth Edition, the doctor opined the claimant fit in the lumbosacral DRE IV category which is a 20 percent permanent partial whole body impairment.

After the second surgery, Dr. Murati imposed work restrictions that claimant can occasionally sit and frequently stand and walk, but he is to alternate these positions. He noted claimant should less than occasionally bend. He noted claimant could occasionally climb stairs, climb ladders, squat and drive but should do no crawling. He noted claimant is to use good body mechanics at all times. Lastly, claimant can lift/carry/push/pull no more than 20 pounds occasionally, 10 pounds frequently, and 5 pounds constantly. The doctor concluded that based upon the AMA Guides, Fourth Edition, the claimant is placed in the lumbosacral DRE IV category of a 20 percent whole person impairment.

Dr. Murati testified that he did not consider it good medical practice to release a patient in claimant's condition with no restrictions. Dr. Murati testified that he reviewed Jerry Hardin's task loss assessment and he agreed with Mr. Hardin's conclusion that utilizing the restrictions he imposed, the claimant had a 66 percent task loss.

The respondent referred the claimant to Dr. Ebelke on September 12, 2000, for evaluation and rating. Dr. Ebelke imposed restrictions in the light/medium category which allowed a maximum occasional lift of 35 pounds and limits repetitive lifting to 15 to 20 pounds. Dr. Ebelke disagreed with Dr. Murati that the claimant belonged in the lumbosacral DRE IV category. He opined that claimant does not meet category IV criteria because there is no loss of motion segment or structural integrity and the description of lumbosacral category IV does not fit claimant's situation. Dr. Ebelke rated the claimant using Table 75 and concluded the claimant had a 19 percent permanent partial whole person impairment. Dr. Ebelke reluctantly reviewed Jerry Hardin's task list and concluded claimant had lost the ability to perform 31 of the 87 listed tasks which computes to a 36 percent task loss.

CONCLUSIONS OF LAW

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in

excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk¹ and Copeland.² In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute, but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.³

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.⁴

At the regular hearing, the parties stipulated that the claimant's average weekly wage was \$406.38. The claimant's uncontradicted testimony was that he was employed as a cook earning \$250 a week. After his release from his initial surgery, the claimant immediately obtained employment. After his release from treatment following his second surgery, the claimant immediately returned to his employment as a cook. The salary he is earning is near the range that both vocational experts testified the claimant had the ability to earn. The claimant has met his burden of proof to establish that he has made a good faith effort to return to work. In making this determination, the Board is not unmindful that Dr. Crabtree released the claimant without any restrictions, however, the opinions of Drs. Ebelke, Murati and Kneidel are more persuasive that following two surgeries to claimant's back some permanent restrictions are appropriate.

The Administrative Law Judge based the claimant's wage loss upon a comparison of his current weekly wage of \$250 with a pre-injury average weekly wage of \$365.40 rather than the stipulated gross average weekly wage of \$406.38. The Administrative Law Judge's decision is modified to reflect that claimant sustained a 38 percent wage loss ($\$406.38 - \$250.00 = \$156.38 \div \406.38).

By adopting Dr. Crabtree's opinion, the Administrative Law Judge concluded that claimant did not have any restrictions and therefore did not have any task loss. However,

¹Foulk v. Colonial Terrace, 20 Kan. App.2d 277, 887 P.2d 140, rev. denied 257 Kan. 1091 (1995).

²Copeland v. Johnson Group, Inc., 24 Kan. App.2d 306, 944 P.2d 179 (1997).

³See Gadberry v. R. L. Polk & Co., 25 Kan. App.2d 800, 802, 975 P.2d 807 (1998).

⁴Copeland at 320.

Drs. Ebelke, Murati and Kneidel all imposed permanent restrictions on the claimant as a result of his surgeries and the Board adopts that rationale as more persuasive than that of Dr. Crabtree.

Because Dr. Kneidel's restrictions were imposed after the initial surgery, the only two doctors that offered opinions regarding restrictions and task loss after the second surgery were Drs. Ebelke and Murati. After reviewing Jerry Hardin's task list, Dr. Murati adopted his conclusion that the claimant sustained a 66 percent task loss. However, a review of the task loss list compiled by Mr. Hardin reveals that Dr. Murati's restrictions eliminated the claimant's ability to perform 54 of 87 total tasks. This computes to a 62 percent task loss rather than 66 percent. It should be noted Dr. Murati did not disagree with Mr. Hardin's report or change any task loss opinion, therefore, it appears this was simply a mathematical calculation error.

Dr. Ebelke reviewed the same task list and concluded claimant could no longer perform 31 of 87 total tasks. This computes to a 36 percent task loss. The Board concludes that in this instance there is no reason to discount either opinion and they will be averaged for a 49 percent task loss.

Combining the 38 percent wage loss with the 49 percent task loss, the claimant has met his burden of proof to establish that as a result of his work-related accident he has sustained a 43.5 percent work disability.

The Board is not unmindful that Karen Crist Terrill performed a task analysis of the claimant. However, she utilized the restrictions Drs. Kneidel and Murati imposed following the first surgery and more significantly neither Drs. Kneidel, Murati nor Ebelke utilized her analysis in offering a task loss opinion. K.S.A. 44-510e(a) requires the opinion of a physician as to a worker's loss of ability to perform work tasks.⁵

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 29, 2001, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Korey J. Degenhardt, and against the respondent, State of Kansas and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred August 28, 1998, and based upon an average weekly wage of \$406.38 for 41.43 weeks of temporary total disability compensation at the rate of \$270.93 per week or \$11,224.63, followed by 169.03 weeks at the rate of \$270.93 per week or \$45,795.30, for a 43.5 percent permanent partial general disability, making a total award of \$57,019.93.

As of July 18, 2001, there would be due and owing to the claimant 41.43 weeks temporary total compensation at \$270.93 per week in the sum of \$11,224.63 plus 109.28

⁵Gadberry at 803.

weeks permanent partial compensation at \$270.93 per week in the sum of \$29,607.23 for a total due and owing of \$40,831.86 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$16,188.07 shall be paid at \$270.93 per week for 59.75 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of July 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney, Wichita, Kansas
Jeffery R. Brewer, Attorney, Wichita, Kansas
Nelsonna P. Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director